



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2005

Ms. Carol Longoria and Ms. Barbara M. Holthaus
Office of the General Counsel
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2902

OR2005-05465

Dear Ms. Longoria and Ms. Holthaus:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226569.

The University of Texas at Tyler (the "university") received two requests for information concerning textbooks utilized by the university. Specifically, the first requestor seeks several categories of information related to the classes offered by the university for the 2005 summer and fall semesters, including information related to the textbooks required for each class. The first requestor also seeks a copy of the current bookstore contract between the university and the on-campus bookstore operated by Texas Book Company (the "university bookstore"). The second requestor seeks information pertaining to the textbook orders from all academic departments for the 2005 fall semester, to include the course identifier, the professor's name "and all other relevant textbook information." You state that the university has released the requested contract to the first requestor, along with some additional responsive information. The submitted documents also reflect that you have released some information to the second requestor. You state that some of the information requested by the first requestor does not yet exist.¹ You claim that the submitted information is excepted from disclosure under section 552.104 of the Government Code. We have considered the

¹ The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

exception you claim and reviewed the submitted representative sample of the requested information.²

Section 552.104 excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that the “university bookstore is an auxiliary enterprise[,]” and as such, “[i]t is required to be financially self-supporting and to generate revenue for its operating budget.” Further, you state, and the submitted contract reflects, that the university is entitled to an annual guarantee of \$200,000 or a commission based on stipulated percentages of gross sales, whichever is greater. *See* Gov’t Code § 2252.061(1) (defining auxiliary enterprise as “a business activity that is conducted at a state agency, provides a service to the agency, and is not paid for with appropriated money”). You indicate that the university bookstore competes with other bookstores in providing textbooks for students, and that release of the submitted information “will provide potential competitors with an unfair competitive advantage over the university bookstore in the marketplace.” Having considered your representations and arguments, we find that you have demonstrated that the university bookstore has specific marketplace interests and may be considered a “competitor” for purposes of section 552.104. *See* ORD 593.

We next address whether release of the submitted information would harm the university bookstore’s marketplace interests. You assert that a competitor could “gain an unfair competitive advantage by using the work product generated with the [u]niversity’s own limited resources to determine which books sold best, then stock and sell those books,

² We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

resulting in deteriorating sales in the [u]niversity [b]ookstore.” You further contend that a competitor could use the requested information “in determining the [u]niversity [b]ookstore’s profit margin per item and then using the information to undercut the prices charged by the [u]niversity [b]ookstore, thereby deteriorating sales.” Having considered your arguments, we conclude that you have shown that release of the submitted information will bring about specific harm to the university bookstore’s marketplace interests. *See id.* Therefore, the university may withhold the submitted information pursuant to section 552.104 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

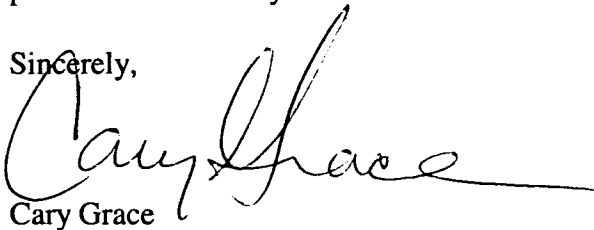
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep’t of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", written over the word "Sincerely,".

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 226569

Enc. Submitted documents

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